71-1672

Supreme Court, U. S.
FILED
JUN 23 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. ....

T. W. GUTHRIE, ET AL,

Petitioners.

versus

ALABAMA BY-PRODUCTS COMPANY, ET AL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Fifth Circuit

ROSCOE HOGAN
1203 City Federal Building
Birmingham, Alabama 35203
Attorney for Petitioner

Of Counsel:

CHARLES E. CLARK
1030 Brown Marx Building
Birmingham, Alabama 35203

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PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Fifth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of the United States District for the Northern District of Alabama.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in *Guthrie v. Alabama By-Products Company* (U.S.C.A., 5th, #71,2498, March 28, 1972) is not yet reported, but is included in the appendix hereto at pages A-5 to A-6. The opinion of the District Court in the case is reported at 328 F. Supp. 1140 and is included

in the appendix hereto at Pages A-7 to A-21. The judgment therein is appended at page A-22.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254 (1) and 28 U.S.C. § 2101 (c) to review the judgment of the Court below entered on March 28, 1972 in this private civil action. No order respecting rehearing below or an extension of time here has been entered.

QUESTIONS PRESENTED FOR REVIEW

This is a multi-Plaintiff, multi-Defendant private civil action for damages and injunctive relief brought under Section 13 of the *Rivers and Harbors Appropriations Act of 1899*, 30 Stat. 1152, as amended, 33 U.S.C. § 407, (hereinafter termed Refuse Act.) The Defendants are each manufacturing establishments discharging refuse into navigable waters or tributaries thereof in Birmingham or Jefferson County, Alabama without the permit required by the Refuse Act. The Plaintiffs are each lower riparian land holders who aver special damage to their property rights. Jurisdiction below was based on federal question jurisdiction, 28 U.S.C. § 1331, as an action arising under Section 13 of the Refuse Act.

There are three (3) primary questions presented for review:

1. Is the direct discharge into navigable waters of manufacturing refuse without the permit required by Section 13 of the Refuse Act lawful if it does not impede or obstruct navigation?

2. If the discharge of refuse is not lawful, can private parties maintain an action to redress injury systained by them as a consequence of violations of the Refuse Act?

3. *If the discharge of refuse is not lawful, is an action brought by private parties to redress injury for the unlawful conduct an action arising under the laws of the United States?*

PERTINENT STATUTE

Rivers and Harbors Act of 1899 (Refuse Act) 33 U.S.C. § 407:

"It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: Provided, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: And provided further, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any

material above mentioned in navigable waters within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful." 30 Stat. 1152.

STATEMENT OF THE CASE

A Writ of Certiorari is sought to review the Fifth Circuit's affirmance of the District Court's dismissal of the complaint in this case for lack of federal jurisdiction.

The eighty-four (84) petitioners are each citizens of the State of Alabama who are lower riparian land holders whose property is located on the banks of one or more of three separate streams flowing through the Birmingham area of Jefferson County, Alabama and into the Black Warrior River which is a navigable waterway in the State of Alabama. The complaint charges that each of the Plaintiffs has suffered special damage from the conduct of each of the Defendants who each operate manufacturing establishments that, without first obtaining the required permit, deposit industrial refuse into one or more of the streams that are tributaries of the Black Warrior River from whence the refuse floats into the navigable water. The complaint alleges that the deposit of refuse by each of the Defendants polluted the streams or rivers on which the Plaintiffs' property is located to the damage of each of the Plaintiffs who each seek compensatory and punitive damages in excess of the federal jurisdictional amount together with injunctive relief.

Each of the Defendants is an industrial or manufacturing establishment and each Defendant discharges refuse without first obtaining the required discharge permit. Each of the Defendants, except those with multiple site operations, operates its polluting establishment independently of

the other polluting operations. All of the Defendants are charged with separate or several liability to each of the Plaintiffs.

The essence of the case is: The Defendants directly discharged refuse from their plants into streams flowing into navigable waters. They did this without applying for, or obtaining, any permit from the United States for this discharge. This discharge polluted the streams and waters and rendered them toxic. The discharge did not result in a direct impediment or obstruction to navigation, but it did result in damage to the lower riparian land holders in a variety of ways.

The Plaintiffs brought this action for the damages resulting to them from the Defendant's breach of the Refuse Act as an action arising under the laws of the United States in the nature of an action for "statutory wrong" or negligence per se.

The District Court dismissed the complaint before trial for lack of federal question jurisdiction under the theory that the Plaintiffs could not maintain the action unless the discharge of refuse impeded or obstructed navigation. The Fifth Circuit affirmed, apparently holding that the Complaint not only failed to invoke federal question jurisdiction, but also failed to present a claim for relief for a violation of the act unless the Defendant's conduct constituted an interference with navigation by which the Plaintiffs were injured.

Both lower Courts thus have held that Section 13 of the Refuse Act applies only to discharge of refuse that interferes with navigation and not to discharge that merely pollutes. We believe this to be erroneous.

REASONS FOR GRANTING WRIT OF CERTIORARI

1. *Important Question Of Federal Law*

The decision of the Courts below clearly interpose a requirement into Section 13 of the Refuse Act that the

direct discharge of manufacturing refuse must impede or obstruct navigation. The addition of this requirement to the section affects not only the private interests of injured riparian land holders, but also the public at large and the policy of the United States.

The environmental concern of the public and its government over polluted waters need not be called to the attention of this Court.

The Refuse Act, and particularly Section 13 thereof, has recently been resurrected from the obscurity with which it resided in the statute books and now occupies a principal place in the drive to clean up our national waters. The Justice Department has instituted criminal and civil prosecutions for its violation; the Corps of Engineers has promulgated regulations for the discharge of refuse. The interference with navigation test adopted by the Fifth Circuit eviscerates the Refuse Act as a tool in this drive for "living" water. This case presents to the Court the opportunity to squarely hold that Section 13 prohibits pollution irrespective of interference with navigation and put to rest the doubts that the Fifth Circuit has created in this area of vital national importance.

2. *Conflict With Applicable Decisions Of This Court*

The decision of the Fifth Circuit with respect to interpolation of the "impediment to navigation" test into the direct discharge provision of Section 13 of the Refuse Act conflicts with the decision of this Court in *U.S. v. Standard Oil Co.* 384 U.S. 224.

The decision of the Fifth Circuit with respect to federal question jurisdiction in this private civil action conflicts with the decisions of this Court in *Gully v. 1st National Bank* 299 U.S. 109; *Tunstall v. Brotherhood of Locomotive Firemen and Engineers* 323 U.S. 210; *Steele v. L.&N. Railroad Company* 323 U.S. 192; *Texas & Pacific Ry Co. v. Rigsby* 241 U.S. 33; and *Bell v. Hood* 327 U.S. 678.

The decision of the Fifth Circuit with respect to the right of the specially damaged parties to maintain an action for statutory wrong conflicts with the decisions of this Court in *Sierra Club v. Morton* 31 L.ed 2d 636; *Wyandotte Trans. Co. v. U.S.* 389 U.S. 191; *Texas & Pacific Ry. Co. v. Rigsby* 241 U.S. 33; *J. I. Case Co. v. Borak* 377 U.S. 426.

3. Conflict With Decisions Of Other Courts Of Appeal

The decision of the Fifth Circuit with respect to the requirement of an impediment to navigation conflicts with the decisions of the 2nd Circuit in *United States v. Ballard Oil Co.* 195 F.2d 369; the 3rd Circuit in *U. S. v. Esso Standard Oil* 375 F. 261; and the 9th Circuit in *La Merced* 84 F.2d 444.

ARGUMENT

I. THE DIRECT DISCHARGE OF REFUSE (OTHER THAN "SEWAGE") INTO NAVIGABLE WATERS IS UNLAWFUL UNLESS A PERMIT IS FIRST OBTAINED FROM THE CORPS OF ENGINEERS AND THE DISCHARGE NEED NOT OBSTRUCT OR IMPEDE NAVIGATION.

A. THE PLAIN LANGUAGE OF THE ACT IMPOSES NO CONDITION THAT THE DISCHARGE IMPEDE OR OBSTRUCT NAVIGATION.

The plain language of § 13 of the Refuse Act clearly does not interpolate a requirement of any impediment or obstruction to navigation into the prohibition of direct discharge of refuse matter into navigable waters, or their tributaries. This may be easily seen if the prohibition against direct discharge, which is separated from the prohibition of deposits on banks of navigable waters by a semi-colon, is considered by itself. The statute thus reads:

> "It shall not be lawful to . . . discharge . . . from the . . . manufacturing establishment . . . any refuse matter . . . [other than sewage] into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; . . . And provided further, that the Secretary of the Army, whenever in the judgment of the Chief of Engineers, anchorage and navigation will not be injured thereby may permit the deposit of any material above mentioned in navigable waters, . . . provided application is made to him prior to depositing such material; . . ." 30 Stat. 1152

There is no language in the portion of Section 13 prohibiting discharge of refuse directly into navigable waters or their tributaries that requires any impediment to or obstruction of navigation as a condition precedent to the prohibition.

In that partion of Section 13 commencing after the semi-colon a different activity is prohibited:

> ". . . 'and it shall not be lawful to deposit . . . . material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water . . . whereby navigation shall be impeded or obstructed: . . ."

It is immediately apparent that the act imposes different tests depending on whether the *refuse* is deposited directly into the navigable water (or tributary) or whether the *material* is placed on a bank. The former conduct is illegal irrespective of any impediment or obstruction to navigation; the latter conduct is illegal only if navigation shall be impeded or obstructed.

B. JUDICIAL CONSTRUCTION OF THIS STATUTE HAS, UNTIL THIS CASE, UNANIMOUSLY SUPPORTED THE PETITIONERS' INTERPRETATION OF THE REFUSE ACT.

In *La Merced* (U.S.C.A. 9th 1936) 84 F.2d 444 Section 13 of the Refuse Act was construed:

> "We see no ambiguity in the statute which prohibits the deposit of 'any refuse matter of any kind or description whatever . . . into any navigable water of the United States'. It is difficult to see how the statute could be plainer, for the meaning is clear under a literal reading of the statute . . ."
>
> "Under such literal construction we see no reason for limiting 'refuse matter of any kind or description whatever' to such refuse matter only as would impede or obstruct navigation . . ." 84 F.2d 444, 446

A most distinguished panel of the Second Circuit interpreted § 13 of the Refuse Act as creating two separate offenses in *U.S. v. Ballard Oil Co. of Hartford* (U.S.C.A. 2d 1952) 195 F.2d 369, 370, in which it was said:

> "The section creates two separate, though kindred, offences; (1) to 'suffer' 'refuse matter' to be 'discharged, or deposited . . . . into any navigable water'; (2) to 'suffer . . . . to be deposited material of any kind in any place on the bank of any navigable water, . . . where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise'. Textually, the second clause is limited by the concluding phrase 'whereby navigation shall or may be impeded or obstructed'; and that interpretation fits well into its purpose, provided one reads it as covering only 'material' which gravity alone will not carry into a stream. Considering the probability that the two sentences were not meant to overlap, it is more reasonable to read the second sentence in this way; . . . ."

This Court has held that § 13 of the Refuse Act intended to correct "serious injury . . . caused in part by obstacles that impeded navigation and in part by pollution . . ." *U.S. v. Standard Oil Co.* 384 U.S. 224, 228-229. Notwithstanding the clear language of Justice Douglas in the *Standard Oil* case differentiating between injuries from obstacles to navigation and from pollutants it has been argued that *Standard Oil* should be distinguished from the present case because floating oil, if afire or in vast quantities, impedes navigation. It is as arguable that any pollution obstructs or impedes navigation. "Navigation" is not only the traffic of freighters, barges and tankers; it is the traffic of sail boats, fishing boats and canoes. Toxic, noxious, polluted water impedes the use and enjoyment of the rivers and streams as much as the threat of fire from an oil spill.

After this Court's decision in *Standard Oil*, the Third Circuit in *U.S. v. Esso Standard Oil Co. of Puerto Rico* (U.S.C.A. 3rd) 375 F.2d 621 (1967) followed the Second, Ninth and Supreme Court decisions in a criminal prosecution brought under the direct discharge provision

of § 13 and imposed liability for the discharge of oil into navigable waters in a case wherein it was agreed that the discharge did not impede or obstruct navigation.

The "impediment to navigation test" adopted by the Fifth Circuit is not merely a "narrow, cramped reading" of § 13 of the Refuse Act; it is an absolute misreading.

C. THE LEGISLATIVE HISTORY OF THE REFUSE ACT DOES NOT SUPPORT THE CONSTRUCTION PLACED ON IT BY THE COURTS BELOW.

The District Court relied on its interpretation of the admittedly sparse legislative history of the Refuse Act to support its conclusion that the direct discharge provision of § 13 required an impediment to navigation. Apart from the Courts disregard of the plain language rule of statutory construction, a much more substantive error was committed by it in also disregarding this Court's construction of that same legislative history as set forth by the Court in *Standard Oil*, supra:

> "It is plain from its legislative history that the 'serious injury' to our water courses sought to be remedied was caused in part by obstacles that impeded navigation and in part by polution . . ." 384 U.S. 224, 228-229.

It would seem that little beyond what this Court has already said, need be said here. However, we have appended for the Court's convenience that portion of an article on *The Refuse Act of 1899* appearing in the *Environment Reporter* on January 28, 1972 related to the legislative history of the Refuse Act. The article contains, in addition to the matter discussed by this Court in *Standard Oil*, comments made in 1926 by Judge G. W. Koonce, an employee of the Corps of Engineers, who assisted in the drafting of the act, that:

> "Under . . . § 13, relating to the discharge of [sic] deposit of refuse matter in navigable water the com-

> mission of any of the acts forbidden, not their results, constitute the offense, and the commission subjects the offending party to the prescribed penalty, *regardless of whether or not there is any actual injury to navigation." (Emp. added)* Environment Reporter, Monograph No. 11, p. 4. Appendix A.

To this we add that the understanding of the Refuse Act by one of its drafters is entirely consistent with its legislative history and this Court's construction of that history.

Section 6 of the Appropriation Act of 1890, made it unlawful to cast, throw, empty or unload certain specified items, all of which might be classed as waste materials, into navigable rivers which should tend to impede or obstruct navigation or to place waste in any place on a bank of a navigable water where it might be washed into a navigable water whereby navigation should be impeded or obstructed. 26 Stat. 453.

Thereafter, the Act of 1894 *added,* without repealing the 1890 Act, the language in Section 6 that made the discharge of matter of any kind other than "sewage" illegal without any reference or requirement whatever of an impediment or obstruction to navigation. 28 Stat. 363.

The Act of 1899 was not, however, a mere codification of the 1890 and 1894 Acts inasmuch as Section 21 expressly repealed any acts in conflict with Sections 10 to 20, which said sections include the pertinent provisions of the Refuse Act. 30 Stat. 1152, 1155. The omission of any requirement of obstruction or impediment to navigation in the 1899 Act is consistent with the added restrictions of the 1894 Act and is, in fact, merely a broader prohibition than that contained in the 1890 Act. In other words, *the extent of the conduct prohibited was extended by the 1894 Act through the deletion of the requirement of an impediment to navigation and Congress approved this extension in 1899.*

The Congressional Record cited by the trial court, so far as is known by Counsel for Plaintiffs, is not inconsistent with the expanded prohibitions of the 1894 and 1899 Acts in that the suggestion that the 1899 Act revised and made clear the existing laws applies with equal force to the prohibition against depositing refuse irrespective of an impediment to navigation contained only in the 1894 Act, as well as that other prohibition requiring an impediment to navigation contained in the 1890 Act. 26 Cong. Record 4376 (House, May 3, 1894); 32 Cong. Record 2297, 2923 (Senate; House).

The Attorney General's Opinion of 1896 relied on by the trial court was not only issued prior to the passage of the 1899 act but may be regarded as consistent with subsequent construction of the Act. In part, the Secretary of War had posed the question:

> ". . . is it the duty of the Secretary of War to act on every petition presented under the circumstances involved in this case, or is it only his duty to act in cases in which the interests of navigation will be affected?"

The answer was:

> "I am of the opinion that it is your duty to act upon the application. If you should decline to act in this and similar cases *the above section would operate as an absolute prohibition*. . . . This was not the intention of Congress [in conferring discretion on the Secretary of War to remove the prohibition to effect the purposes contemplated by Congress]." (Emphasis supplied) 21 Op. Atty. Gen. 305, 306.

D. THE CONSTRUCTION OF THE REFUSE ACT BY THE FIFTH CIRCUIT CONFLICTS WITH THE ENFORCEMENT PROCEDURES OF THE UNITED STATES.

Governmental agencies enforcing the Act do not consider an impediment to navigation to be a condition prece-

dent to compliance with the anti-discharge provisions of the Act.

Regulations of the Refuse Act permit program issued by the Corps of Engineers on April 7, 1971 provide in part:

> "The Refuse Act is considered to apply to all direct and indirect discharges or deposits (except those flowing from streets and sewers and passing therefrom in a liquid state) by any person, firm or other entity, including discharges or deposits from municipal, state or federal facilities or installation, into a navigable waterway or tributary." 33 *C.F.R.* §209.131 (d) (i); 36 Fed. Reg. 6564 (1971)

In several cases the Justice Department has prosecuted violators of the Refuse Act where there has been no impediment to navigation. *U.S. v. Interlake Steel Corp.* (U.S. D.C. N.D. Ill. 1969) 297 F. Supp. 912; *U.S. vs. U.S. Steel Corp.* (U.S. D.C. Ind. 1970) 328 F. Supp. 354; *U.S. v. U.S. Steel Corp.* (U.S.D.C., N.D. Ill. 1971) F. Supp. In fact, in *U.S. v. Pennsylvania Industrial Chemical Corp.* (U.S.D.C., W.D. Pa. 1971) 329 F. Supp. 118, the Court, after noting the uniqueness of the holding in this case, agreed with the prosecution that all industrial discharges are prohibited irrespective of not only an impediment to navigation but even of an effect upon the water.

The failure to reverse the decision in this case will not only materially impede the enforcement of the statute by the United States but may leave the States in the Fifth Circuit to march alone to a different tune.

II. THE UNLAWFUL DISCHARGE OF REFUSE INTO NAVIGABLE WATERS IS ACTIONABLE BY SPECIALLY DAMAGED PRIVATE PARTIES AND IS AN ACTION ARISING UNDER THE LAWS OF THE UNITED STATES

The decisions of the lower courts in dismissing for want of federal jurisdiction because the Plaintiffs were not in-

jured by an obstruction to navigation left unresolved two questions submitted by petitioners to this Court for review in the hope, if this Court should reverse the lower courts in their limited decisions with respect to the requirement of an impediment to navigation, that the Court will also hold that the action brought by Plaintiffs arises under federal law and that the statute creates a private civil action implied at law for injury resulting from the Defendants' breach.

The petitioners' action does not involve "standing" in the sense of this Court's recent decision in *Sierra Club v. Morton* or *Alameda Conservation v. California* (U.S.C.A., 9th 1971) 437 F. 2d 1087 although both decisions support the petitioners' right to maintain an action for their special injury. Rather, the petitioners' action is a classic action for statutory wrong.

A. THE RIVERS AND HARBORS ACT OF 1899 CREATES A PRIVATE CIVIL ACTION IMPLIED AT LAW FOR ITS BREACH

The principle that a civil remedy is implied at law in favor of those for whose benefit a criminal statute was enacted is widely accepted. Indeed, this rule has recently been implicitly recognized by the Fifth Circuit in *U.S. v. Cargill, Inc.* (U.S.C.A., 5th, 1966) 367 F. 2d 971 and affirmed in *Wyandotte Trans. Co. v. United States,* 389 U.S. 191, 202, (1967) in which a civil action implied in favor of the government under the Rivers and Harbors Act was held to lie. This Court held:

> ". . . Our decisions in cases involving a civil actions of private parties based on the violation of a penal statute [indicate that the general rule may be invoked in favor of the government]. *Texas & Pacific R. Co. v. Rigsby* 241 U.S. 33 (1916); *J. I. Case Co. v. Borak* 377 U.S. 426 (1964). In those cases we concluded that criminal liability was inadequate to ensure the full effectiveness of the statute which Congress had

> intended. Because the interest of the plaintiffs in those cases fell within the class that the statute was intended to protect, and because the harm was of the type that the statute was intended to forestall, we held that civil actions were proper. That conclusion was in accordance with a general rule of the law of torts. See Restatement (Second) of Torts Section 286 . . . ."

To the same effect are: *United States v. Republic Steel* 362 U.S. 482 (1960); *Hooper v. Mountain State Securities* (U.S.C.A., 5th, 1960) 282 F. 2d 195; *Fitzgerald v. Pan American World Airways* (U.S.C.A., 2nd, 1956) 229 F. 2d 499.

The plaintiffs contend that, where a statute establishes a standard of conduct, a person injured by the breach of that standard of conduct is within the class for whom protection is afforded and may recover in damages for its breach even though the statute fails to expressly provide for a private right of action. The right of recovery is implied from the breach of duty. See: *Texas & Pacific v. Rigsby* 241 U.S. 33 (1915) in which as to this point the Court says in construing the Safety Appliance Act:

> "None of the acts, indeed, contains express language conferring a right of action for the death or injury of an employee; but the safety of employees and travelers is their principal object, and the right of private action by an injured employee, even without the Employer's Liability Act, has never been doubted. (citations omitted) A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied according to a doctrine of the common law. . . ."

And see: *Tunstall v. Brotherhood of Locomotive Fireman and Enginemen*, 323 U.S. 210 (1944); *Steele v. L & N*, 323 U.S. 192 (1944):

> "We also hold that the right asserted by petitioner which is derived from the duty imposed by the Railway

> Labor Act on the Brotherhood, as bargaining representative, is a federal right implied from the statute and the policy which it has adopted.
>
> It is the federal statute which condemns as unlawful the Brotherhood's conduct. The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted (cites omitted) The case is therefore one arising under a law regulating commerce of which the federal courts are given jurisdiction. . . ."

The Second Circuit addressed itself squarely to both the implied cause of action and federal question jurisdiction questions in *Fitzgerald v. Pan American World Airways*, 229 F. 2d 499 (2nd, 1956). In that case, Ella Fitzgerald was refused passage in Hawaii. The action was brought under federal question jurisdiction in New York for the violation of non-discrimination provisions of the Civil Aeronautics Acts. A violation of the section was made a crime under separate sections of the Act. The District Court dismissed holding that there was no express civil liability under the Act, that the claim was cognizable in state law and that there was no federal jurisdiction. The Second Circuit reversed saying:

> "Consequently, by implication, its violation creates an actionable civil right for the vindiction of which a civil action may be maintained by any such person who has been harmed by the violation (cites omitted). Although no express civil liability is provided a criminal statute creates a civil right in the protected class although the only express sanctions are criminal."

The clear and consistently applied construction of the Rivers and Harbors Act of 1899 from the earliest case to the latest — and including two prior decisions of the Fifth Circuit — hold that a private civil action may be maintained as an original action for damages or other relief from violation of the Act.

We have previously demonstrated that the lower courts erred in holding that an impediment to navigation is required under §13 of the Refuse Act. To the extent that the Fifth Circuit may have held that a federal cause of action does not exist in favor of the plaintiffs even if there were an impediment to navigation, we are compelled to discuss some of the numerous decisions under the Rivers and Harbors Act of 1899 holding that a federal action does lie. We note here, in passing, that we have previously pointed out that the 1899 Act was one act replacing both the 1890 and 1894 Acts. As such, decisions under other sections of the Act are relevant to a decision under §13.

The Fifth Circuit first held that there was a private federal cause of action for violation of the Act in *Neches Canal Co. v. Miller & Vider Lumber Co.* (U.S.C.A. 5th 1928) 24 F. 2d 763. In that case a lumber company brought an original action in the District Court seeking injunctive relief and damages from the defendants who constructed a dam, in violation of §401 of the statute, that prevented the movement of logs and resulted in the loss of some logs. The Court held:

> "The Lumber Company, being the user of the navigable stream which was obstructed in violation of the statute, was a beneficiary of the statute forbidding its obstruction, and the remedy given by the statute was available in behalf of the Lumber Company. The suit was maintainable in the court below as one arising under the laws of the United States, as a right asserted and a remedy sought by the amended bill was based on acts of Congress."

In what the Fifth Circuit characterized as a "maritime" case an original action in the District Court seeking damages for loss of a vessel sunk by timbers afloat in a navigable water was held to state a claim under §13 of the Refuse Act. *Acme Boat Rentals v. J. Ray McDermott & Company* (U.S.C.A. 5th 1970) 424 F. 2d 393. So also, a private cause

of action brought for failure to comply with marking regulations under the Act that caused damage to the plaintiff's vessel was held to create an implied cause of action. *American Zinc Co. v. Foster* (U.S.D.C., Miss., 1970) 313 F. Supp. 671.

In *Lauritzen v. Ches. Bay Bridge & Tunnel Dist.* 259 F. Supp. 633 (D.C. Va. 1966); *aff'd in part,* (U.S.C.A. 4th 1968) 404 F. 2d 1001 an action was brought for damages sustained by a vessel that struck an underwater obstruction left in the river in violation of the regulations issued in connection with the construction of a bridge. The District Court said:

> "It is true that the federal navigation regulations do not expressly provide a cause of action for injured third parties. . . .but such liability is clearly implied. Even though it be conceded that the statutes pertaining to the protection of navigable waters (cites omitted) are penal in nature, it is clear that civil liability may be derived therefrom both in favor of the United States (cited omitted) and private parties. *Morania Barge #140 Inc. vs. M. J. Tracy, Inc.* 312 F. 2d 78 (2nd Cir 1962), Violation of the navigation laws gives rise to a presumption of negligence which, if not rebutted, may result in liability of the negligent party. (cites omitted). We think it is evident that the regulations pertaining to the obstruction of navigable waters were manifestly intended for the protection of private parties such as the libelant here, even though the enforcement of the provisions was vested in the United States."

See also: *Gulf Atlantic Transportation Company v. Becker County Sand & Gravel,* 122 F. Supp. 13 (1954); *Maier v. Publicker Commercial Alcohol Co.* 62 F. Supp. 161 (1945), Affd. 154 F. 2d 1020 (3rd Cir. 1946); *Converse v. Portsmouth Cotton Oil Refinery Co.* 281 F. 981 (U.S.C.A. 4th 1922); *Myrtle Point Transport Company v. Port of Cogsville River* (Sup. Ct. Oregon) 168 P. 625

(1917); *Chatfield v. City of New Haven* (C.C. Conn. 1901) 110 F. 788.

The foregoing cases establish that the assertion by the Plaintiffs of a cause of action for violation of the federal statute, even in the absence of an express provision for civil relief and even where the conduct is also criminal, is certainly not unique.

But more important, the great weight of authority under the Rivers and Harbors Act of 1899 clearly establishes the cause of action for damages and for injunctive relief that the Plaintiffs assert. Although the instant case is a case of first impression under its facts, the Fifth Circuit has held, in the only two cases known by Plaintiff to have been presented to it under the Rivers and Harbors Act of 1899, that the Act created private rights for enforcement and for damages in one damaged by a breach of the Act.

B. A PRIVATE CIVIL ACTION BROUGHT UNDER THE RIVERS AND HARBORS ACT OF 1899 IS AN ACTION ARISING UNDER THE LAWS OF THE UNITED STATES WITHIN THE MEANING OF THE FEDERAL JURISDICTION STATUTE.

Jurisdiction of the United States Courts arises under 28 U.S.C. §1331 and involves a federal question under §13 of the Refuse Act.

At the outset we submit that the existence of state law claims, remedies and forums could not deprive the court of jurisdiction. That the conduct of the Defendants gave rise to an action under state law was recognized by the Plaintiffs who joined state claims under the pendent jurisdiction doctrine of *United Mine Workers v. Gibbs* 383 U.S. 715 (1966). A quotation from that case may be helpful in demonstrating that the question of federal jurisdiction under a federal law is not affected by the availability of state claim remedies in state court. The Court said in

criticizing the use of *Hurn v. Ousler* langauge 289 U.S. at 246, 77 L. ed. at 1154 to limit pendent jurisdiction:

> "This limited approach is unnecessarily grudging. Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim "arising under (the) Constitution, the laws of the United States, and Treaties made, or which shall be made, under this authority. . . ." U. S. Const. Art. III §2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the Court comprises but one constitutional 'case' 12"
>
> "12 The question whether joined state and federal claims constitute one 'case' for jurisdictional purposes is to be distinguished from the often equally difficult inquiry whether any 'case' at all is presented. *Gully vs. First Nat'l Bank* 299 U.S.C. 81 L. Ed. 70, 57 S.Ct. 96, although the issue whether a claim for relief qualifies as a case "arising under. . . the laws of the United States' and the issue whether federal and state claims constitute one 'case' for pendent jurisdiction purpose may often appear together. . . ."
>
> Resuming: "the federal claim must have substance sufficient to confer subject matter jurisdiction on the Court. (cites omitted) The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a Plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issue there is power in federal courts to hear the whole."

We do not believe it would be contested that one act can give rise to both state and federal claims, and it is without doubt that under our federal system both United States and state courts often have concurrent jurisdiction. As a consequence, a plaintiff quite often has the right to elect the forum in which to maintain his action. In this action the Plaintiff selected a federal forum.

The first case known to the Plaintiff involving a private federal question action under the Rivers and Harbors Act of 1899 is *Chatfield v. City of New Haven* (C. Ct. Conn. 1901) 110 F. 788. In this case an upper riparian landowner's free use of an intra-state waterway was obstructed by a bridge. The nondiverse plaintiffs brought a bill for an injunction against the continuance of the obstruction. The Secretary of War, in the exercise of his regulatory authority under the Act of 1899 had ordered a draw provided in the bridge but the city had not complied. After discussing the legislative history of the 1899 Act the Court held:

> ". . . .The right of private parties to invoke the aid of the courts of the United States to prevent this unreasonable obstruction to navigation, which produces an especial injury to them depends upon the effect which may be given to this statute. It is therefore, a case arising under the laws of the United States, and this court has jurisdiction to determine whether the bill has stated a cause of action which entitled the Complainants to relief." (cited omitted)
>
> "The two objections which are urged against the statute are that it is unconstitutional, and that, if valid, its effect is limited to a criminal prosecution by the United States against the Defendants"

After holding the Act constitutional the Court went on to hold that the bill had equity and overruled the demurrers to it:

> "The next point is that as the section does not authorize a suit in favor of private parties, no such authority exists. The question is not whether authority exists to bring the action in the district court in behalf of individuals, or whether authority is given to the attorney general to bring a bill in equity in behalf of the United States. It is conceded that such authority must be expressly conferred. But jurisdiction has always existed in the circuit court to have cognizance of suits of a civil nature between individuals which arise out of the laws of the United States when the

matter in dispute exceeds a specified sum, and, if a cause of action has thus arisen, no further or more specific authority is requisite."

In *U.S. v. Republic Steel* 362 U.S. 482 (1960) Justice Douglas says that the "void" — created by the decision in *Willamette Iron Bridge v. Hatch* 125 U.S. 1, (1888), in which it was held that there was no common law or statutory law of the United States that prohibited the obstruction of navigable waters, — was filled by the Rivers and Harbors Act of 1899.

As a matter of logic it must be that any right created in a private person for redress for violation of the Act — and we have seen numerous instances of resort to rights established by the 1899 act in the prior discussion — must arise under the laws of the United States. Indeed, the test of *Gully v. 1st Nat'l Bank* 299 U.S. 109, 111 (1936) that ". . .a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . .and "The right or immunity must be given such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. . ." can hardly be more clearly met then under the instant complaint.

Thus, under similar circumstances in *Bell v. Hood,* 327 U.S. 678 (1964) in which the plaintiffs brought suit in the District Court for damages for violation of their Constitutional rights under the Fourth and Fifth Amendments arising from false imprisonment by agents of the F.B.I.— the District Court dismissed for lack of jurisdiction, the Circuit Court affirmed, the Supreme Court reversed.

The defendants contended that Plaintiff's action could be maintained under state law and did not raise a question under federal law and that there was no federal law giving rise to a cause of action for damages.

"Whether or not the complaint as drafted states a common law action in trespass made actionable by state law, it is clear from the way it was drawn that petitioners seek recovery squarely on the ground that respondents violated the Fourth and Fifth Amendments. . . Before deciding there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover. . .under the laws of the United States. For to that extent the party who brings a suit is master to decide what law he will rely upon and. . .does determine whether he will bring a 'suit arising under' the . . . .laws of the United States. . ."

(There are two possible exceptions to this rule) "Where the (federal statutes clearly appear) to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."

(The right to recover damages is not a frivolous question under federal law and the plaintiffs rights under the complaint) "will be sustained if the Constitution and laws of the United States be given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction."

To the same effect is *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen,* 332 U.S. 210, supra, and *Fitzgerald v. Pan American,* 229 F. 2d 499, discussed supra, in which after holding that there was a private implied right of action under the Civil Aeronautics Acts the court continued:

"Although a right created by a federal statute covers the same ground as a right already existing under the common law of the states and territories, a suit based on that federal statute is one 'arising under' a law of the United States, so that a federal district court has jurisdiction. No federal common law of torts exists; when Congress enacts legislation rendering it tortious to do what is already a state common law tort, a suit based on that legislation is within 28 U.S.C. §1331."

It is to the federally protected rights under the Refuse Act that plaintiffs look in this action in the United States Courts to preserve and protect the streams and rivers flowing through their property.

CONCLUSION

The interests of the Republic, its people, and the petitioners require that this Court issue its writ of certiorari and reverse the decision of the Fifth Circuit.

Respectfully Submitted,

ROSCOE HOGAN
1203 City Federal Building
Birmingham, Alabama 35203
Attorney for Petitioner

Of Counsel:
CHARLES E. CLARK
1030 Brown Marx Building
Birmingham, Alabama 35203

APPENDIX

APPENDIX I

Pertinent Statutes and Regulations

1. 33 U.S.C. § 407

Deposit of refuse in navigable waters generally.

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise whereby navigation shall or may be impeded or obstructed: *Provided.* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officer supervising such improvement or public work; And *provided further,* That the Secretary of the Army whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him provided application is made to him prior to depositing such material; and whenever any permit is so granted the con-

ditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

2. 30 Stat. 1152, March 3, 1899

SEC. 13. That it shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of War, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

3. 25 Stat. 453

SEC. 6. That it shall not be lawful to cast, throw, empty, or unladen, or cause, suffer, or procure to be cast, thrown, emptied, or unladen, either from or out of any ship, vessel, lighter, barge, boat, or other craft or from the shore, pier, wharf, furnace, manufacturing establishments, or mills of any kind whatever, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind, into any port, road, roadstead, harbor, haven, navigable river, or navigable waters of the United States which shall tend to impede or obstruct navigation, or to deposit or place or cause, suffer, or procure to be deposited or placed, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, or other waste in any place or situation on the bank of any navigable waters where the same shall be liable to be washed into such navigable waters, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed. *Provided,* That nothing herein contained shall extend or be construed to extend to the casting out, unlading, or throwing out of any ship or vessel, lighter, barge, boat, or other craft, any stones, rocks, bricks, lime, or other materials used, or to be used, in or toward the building, repairing, or keeping in repair any quay, pier, wharf, weir, bridge, building, or other work lawfully erected or to be erected on the banks or sides of any port, harbor, haven, channel, or navigable river, or to the casting out, unlading, or depositing of any material excavated for the improvement of navigable waters, into such places and in such manner as may be deemed by the United States officer supervising said improvement most judicious and practicable and for the best interests of such improvements, or to prevent the depositing of any substance above mentioned under a permit from the Secretary of War, which

he is hereby authorized to grant, in any place designated by him where navigation will not be obstructed thereby.

4. 28 Stat. 363

SEC. 6. That it shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the waters of any harbor or river of the United States, for the improvement of which money has been appropriated by Congress, elsewhere than within the limits defined and permitted by the Secretary of War; neither shall it be lawful for any person or persons to move, destroy, or injure in any manner whatever any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, in navigable waters, or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks; any and every such act is made a misdemeanor, and every person knowingly engaged in or who shall knowingly aid, abet, authorize or instigate a violation of this section shall, upon conviction, be punishable by fine or imprisonment, or both, such fine to be not less than two hundred and fifty dollars nor more than twenty-five hundred dollars, and imprisonment to be not less than thirty days nor more than one year, either or both united, as the judge before whom conviction is obtained shall decide, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction of this misdemeanor.

APPENDIX II

Decision of Fifth Circuit

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2498

T. W. GUTHRIE, ET AL.,
Plaintiffs-Appellants,

versus

ALABAMA BY-PRODUCTS COMPANY, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

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(March 28, 1972)

Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges

PER CURIAM: This is an appeal from the judgment of the district court dismissing appellants' complaint for want of federal question or diversity jurisdiction. Appellants primarily complain of the district court's holding that a private civil action brought by individuals damaged by defendants' polluting certain streams and rivers did

not state a federal right of action or supply federal question jurisdiction pursuant to the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C.A. § 407, unless defendants' conduct constituted an interference with navigation by which the plaintiffs were injured. We AFFIRM on the basis of the district court's well-reasoned opinion, reported at *328* F. Supp. *1140*.

AFFIRMED

APPENDIX III

District Court Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

T. W. GUTHRIE, et al., Plaintiffs	)	
vs.	)	CIVIL ACTION
ALABAMA BY-PRODUCTS COMPANY, a corporation, et al., Defendants	)	NO. 71-21

MEMORANDUM OPINION

Plaintiffs, as lower riparian landowners, seek damages and injunctive relief for alleged water pollution.

This action was filed on behalf of some 65 named plaintiffs "and all others similarly situated." Plaintiffs alledge that they are reparian landowners along the Warrior River, a navigable waterway, and some of its tributary creeks which run through the industrial valley of Birmingham. The defendants named in the original complaint are some 19 industrial corporations who, plaintiffs aver, discharge liquid wastes from their industrial plants into creeks emptying into the Warrior River. Plaintiffs allege that they own riparian lands downstream from the points where some or all of the defendants discharge such wastes; that they use these lands for both commercial and recreational purposes; and that the wastes discharged by defendants cause the waters of the Warrior River to be harmful and offensive to fish, wildlife, livestock and human beings, including the plaintiffs, and that as a consequence of this pollution the

use, value and enjoyment of their riparian lands have been impaired.

In the original complaint, federal jurisdiction is posted exclusively upon 28 U.S.C.A. § 1331, the theory being that the defendants are discharging the wastes complained of in violation of Section 13 of the Rivers and Harbors Appropriation Act of 1899.[1] In addition, plaintiffs contend that the defendants are liable for the same acts on common law theories of negligence, trespass and nuisance.

Defendants filed motions to dismiss the original complaint advancing the ground, inter alia that this court lacks jurisdiction over the subject matter of the action because the matter in controversy does not arise under the Constitution, laws or treaties of the United States within the meaning of 28 U.S.C.A. § 1331.

Plaintiffs thereafter filed three amendments to the complaint. The first such amendment alleges (a) diversity of citizenship between the plaintiffs and some, but not all, of the defendants, (b) that the State of Alabama has issued or provided for the issuance of permits to the defendants for their industrial waste discharges through the Alabama Water Improvement Commission, (c) that the complaint, as amended, raises a federal question under one of the Civil Rights Acts,[2] (d) that the complaint, as amended, raises a federal question under the 14th Amendment to the Constitution of the United States, and (e) class action allegations of the type sanctioned by Rule 23, F.R.C.P.

By two additional amendments, plaintiffs (a) strike two of the original plaintiffs and add fourteen new plaintiffs, (b) add three defendants, (c) assert jurisdiction under the 5th Amendment to the Constitution of the United States, (d) urge pendent jurisdiction of their non-federal claims,

[1] 33 U.S.C.A. § 407.
[2] 42 U.S.C.A. § 1983(d).

and (e) divide their claim into six separate counts, asserting claims which may be summarized as based upon violations of 33 U.S.C.A. § 407, negligence, willful and wanton misconduct, nuisance and deprivation of property and the enjoyment thereof in violation of 42 U.S.C.A. § 1983, the Fifth and Fourteenth Amendments of the United States Constitution.

Defendants refiled motions to dismiss the complaint as amended again adverting to the lack of federal question jurisdiction and the lack of diversity jurisdiction, inter alia. The court has considered the extensive briefs from all parties and the thoroughly excellent oral arguments of counsel, and has concluded that this court does not have jurisdiction of the subject matter of this action.

Diversity of Citizenship

The amended complaint discloses facially that some of the defendants are citizens of Alabama, as are the plaintiffs. A fundamental principle of federal diversity jurisdiction is that the diversity must be complete, so that all the plaintiffs are citizens of different states from all the defendants.[3] Plaintiffs' suggestion that the joinder of claims permitted by Rule 20, F.R.C.P., relieves the necessity of complete diversity will not do. There is no federal jurisdiction of this action based on diversity of citizenship. Moreover, since the lack of diversity is an actual defect, and not merely a formal one, it cannot be cured by a further amendment.[4]

Civil Rights Act
and U.S. Constitution

42 U.S.C.A. § 1983 gives a right of action to redress certain deprivations, under color of state law, of ". . . rights, privileges, or immunities secured by the Constitution and

[3] See, e.g. Strawbridge v. Curtiss, 7 U.S. 267 (1806).
[4] Russell v. Basila Manufacturing Co., 246 F.2d 432 (5th Cir. 1957).

laws . . ." of the United States. However, this civil rights statute is intended for the protection of personal liberties rather than for the protection of property rights.[5]

In this action plaintiffs sue as riparian landowners. All of the injuries complained of relate to plaintiffs' interests in real property. These are not the kinds of interests protected by 42 U.S.C.A. § 1983.

Another element that is essential to a claim under 42 U.S.C.A. § 1983 is that the action complained of be "under color" of state law. It is likewise necessary, in order to invoke the protection of the 14th Amendment, that there be "state action."[6] The only state action, or action under color of state law, alleged in the amended complaint, is that Alabama has created an agency known as the Water Improvement Commission and conferred upon it power to issue permits for the discharge of industrial liquid wastes and that some of the defendants are discharging the wastes complained of pursuant to such permits. Alabama's issuance of a permit for industrial waste discharges, even though the issuing agency has power to regulate or prohibit the discharges, is not the kind of state action which makes such discharges subject to the limitations of the 14th Amendment; nor does the fact that the defendants, or some of them, obtained such permits convert their discharges of industrial waste into action under color of state law within the ambit of the civil rights acts.[7]

[5] Hague v. C.I.O., 307 U.S. 496 (1939) (Justice Stone's opinion); Garren v. Winston-Salem, 439 F.2d 140 (4th Cir. 1971); National Land and Inv. Co. v. Specter, 428 F.2d 91 (3rd Cir. 1970); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969); Bradford Audio Corp. v. Pious, 392 F.2d 67 (2d Cir. 1968).

[6] Shelley v. Kraemer, 334 U.S. 1 (1948).

[7] Environmental Defense Fund v. Hoerner Waldrof, 1 Environment Reporter Cases 1640 (D. Mont. Aug. 27, 1970); Bright v. Isenbarger, 314 F.Supp. 1382 (N.D. Ind. 1970); Weyandt v. Mason's Stores, Inc., 279 F.Supp. 283 (W.D. Pa. 1968); Grossner v. Trustees of Columbia University, 287 F. Supp. 535 (S.D. N.Y. 1968); Pugliano v. Staziak, 231 F. Supp. 347, 351 (W.D. Pa. 1964) aff'd 345 F.2d 797 (3d Cir. 1965); Wood v. Hogan, 215 F.Supp. 53 (W.D. Va. 1963); Smith v. Jennings, 148 F.Supp. 641 (W.D. Mich. 1957).

The 5th Amendment to the Constitution of the United States applies to action of the federal government. Plaintiffs do not allege a federal permit or any other basis for attributing responsibility for the industrial waste discharges complained of to the federal government.

Accordingly, the amended complaint does not present a controversy which arises under 42 U.S.C.A. § 1983, or under the 5th or 14th Amendments to the United States Constitution.

The Rivers and Harbors Appropriation Act of 1899

Plaintiffs have urged with great emphasis that there is federal question jurisdiction on the ground that the amended complaint presents a controversy arising under Section 13 of the Rivers and Harbors Appropriation Act of 1899.[8] Plaintiffs allege that the defendants' discharges are "refuse" within the meaning of 33 U.S.C.A. § 407, and that the defendants ". . . on divers dates continuing up until the date of filing this claim deposited refuse into tributaries of navigable waters from which said refuse floats into navigable waters without first obtaining permits from proper United States authorities for the discharge of said refuse materials into said tributaries or navigable waters all in violation of Title 33, U.S.C.A. Sec. 407."

Assuming, arguendo, that the amended complaint charges violations of 33 U.S.C.A. § 407, it does not follow that plaintiffs' claim of injuries resulting from conduct which violates 33 U.S.C.A. § 407 "arises under" that statute in a sense that confers federal court jurisdiction of this action under 28 U.S.C.A. § 1331. The test of whether a claim "arises under" the laws of the United States is not a precise one. It is clear, however, that something more than mere reference to a federal statute is required. Perhaps the

[8] 33 U.S.C.A. § 407.

most frequently quoted statement of basic guiding principles can be found in the Justice Cardozo's opinion in *Gully v. First National Bank,* 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936).

> How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United State must be an element and an essential one, of the plaintiff's cause of action . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect and defeated if they receive another . . . (citations omitted).
>
> 299 U.S. at 112-113

In *Shulthis v. McDougal,* 225 U.S. 561, 32 S.Ct. 704, 56 L.Ed. 1205 (1912), the Court stated:

> A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the results depend.
>
> 225 U.S. at 569

In *Johnston v. Byrd,* 354 F.2d 982 (5th Cir. 1965), a case involving a controversy regarding title to personal property within Alabama, the Court stated:

> State law determines that question, not federal law. A question of federal law is often 'lurking in the background' of every case. In order to invoke the jurisdiction of a federal court there must be 'a substantial claim founded "directly" upon federal law.'
>
> 345 F.2d at 984

With these principles in mind, it is necessary to examine the basis of plaintiffs' right of action and the effect thereon, if any, of 33 U.S.C.A. § 407.

First, it is clear that the plaintiffs' right to relief does not depend exclusively upon the existence of 33 U.S.C.A. § 407, or upon whether the defendants are violating that statute. The law of Alabama recognizes a right of action for past damages, as well as a right to injunctive relief to prevent future damages, for impairment of the value and enjoyment of riparian lands resulting from water pollution. [9] Plaintiffs contend, however, that 33 U.S.C.A. § 407 grants a federally created cause of action for the same injury and entitles plaintiffs to the same relief as that available under the state common law causes of action. Plaintiffs concede that neither 33 U.S.C.A. § 407 nor any other part of the Rivers and Harbors Act expressly provides for a private civil remedy. Rather, they rely on the principle that a civil remedy for violation of a penal statute may be implied in favor of persons in the class for whose special benefit the statute was enacted. The court recognizes this as a sound principle of law, but its applicability depends upon whether the plaintiffs are within the class of persons for whose special benefit the statute was enacted and the statutory enactment was for the purpose of protecting against the type of harm or injury which has in fact occurred.[10]

A careful review of the Rivers and Harbors Appropriation Act of 1899, its legislative history, its administrative interpretation and its judicial gloss has convinced this court that 33 U.S.C.A. § 407 was not enacted for the purpose or with the effect of creating a federal cause of action to protect riparian landowners from the kinds of water polution that have traditionally been dealt with under the law of nuisance.

[9] See, e.g., Montgomery Limestone Co. v. Bearden, 256 Ala. 269, 54 So. 2d 571 (1951), and Tutwiler Coal, Coke & Iron Co. v. Nichols, 146 Ala. 364, 39 So. 762 (1905).

[10] See Texas & Pacific R. Co. v. Rigsby, 241 U.S. 33, 39 (1969); Fitzgerald v. Pan American World Airways, 229 F.2d 499, 501 (2d Cir. 1956); Kardon v. National Gypsum Co., 69 F.Supp. 512, 513 (E.D. Pa. 1956).

The Act of 1899 included provisions regulating all kinds of construction in navigable waters,[11] providing for establishment of harbor lines and prohibiting encroachments,[12] regulating the creation and providing for removal of all kinds of obstructions in navigable waters,[13] regulating deposits of refuse in and adjacent to navigable waters,[14] and prohibiting injuries to river and harbor improvements.[15] Provisions were also made for enforcement of the act by criminal penalties.[16] It is clear that these provisions were part of the efforts by Congress to maintain the nation's navigable waterways, as routes of commerce, free from obstructions.

A similar view was expressed by the Supreme Court in a recent opinion involving this legislation, as follows:

> Article 1, § 8 of the Constitution grants to Congress the power to regulate commerce. For the exercise of this power the navigable waters of the United States are to be deemed the "public property of the nation and subject to all the requisite legislation by Congress." . . . the federal government is charged with insuring that navigable waterways, like any other routes of commerce over which it has assumed control, remain free of obstruction. . . . the Rivers and Harbors Act of 1899, an assertion of the sovereign power of the United States, . . . was obviously intended to prevent obstructions in the nation's waterways. Despite some difficulties with the wording of the Act, we have consistently found its coverage to be broad . . . and we have found that a principal beneficiary of the Act, if not the principal beneficiary, is the government itself. (citations omitted).
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> Wyandotte Transportation Co. v. United States, 289 U.S. 191, 88 S.Ct. 379, 19 L.Ed. 2d 407 (1967)

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[11] 33 U.S.C.A. §§ 401, 406.
[12] 33 U.S.C.A. § 404.
[13] 33 U.S.C.A. §§ 403, 409, 414-15.
[14] 33 U.S.C.A. § 407.
[15] 33 U.S.C.A. § 408.
[16] 33 U.S.C.A. §§ 411-413.

This court concludes that the purposes and extent of the Rivers and Harbors Act was to assist the federal government in insuring that our navigable waterways remain free of obstruction and to protect the special interest in freedom from such obstructions of those who use the nation's waterways for purposes of navigation. Numerous judicial decisions have held that violation of the penal provisions of the 1899 Act with resulting injury to rights of navigation or anchorage can be the basis of a federal right of action, either within general admiralty jurisdiction or as an implied federal cause of action.[17]

On the other hand, no court has recognized a federally created right of action under the 1899 Act where the interest to be protected is unrelated to rights of navigation or anchorage. The few decisions considering the matter have consistently denied that such a federally-created right of action exists.[18]

Plaintiffs rely heavily upon *Alameda Conservation Association v. California,* 437 F.2d 1087 (9th Cir. 1971). This decision is not regarded as persuasive on the issue before this court because in Alameda several alternate bases of federal jurisdiction were alleged and the only question discussed in the opinion was that of the plaintiffs' standing to sue. Since plaintiffs in the present case are complaining of injury to their private property, they clearly have stand-

[17] See Acme Boat Rentals v. J. Ray McDermott & Co., 424 F.2d 393 (5th Cir. 1970); Tatum v. Blackstock, 319 F.2d 393 (5th Cir. 1963); Neches Canal Co. v. Miller & Vidor Lumber Co., 24 F.2d 763 (5th Cir. 1928); Converse v. Portsmouth Cotton Oil Ref. Co., 281 Fed. 981 (4th Cir. 1922); American Zinc Co. v. Foster, 313 F.Supp. 671 (S.D. Miss. 1970); Lauritzen v. Chesapeake Bay Bridge & Tunnel District, 259 F. Supp. 633 (E.D. Va. 1966); Gulf Atlantic Transportation Co. v. Becker County Sand & Gravel, 122 F.Supp. 13 (E.D. N.C. 1954); Maier v. Publicker Commercial Alcohol Co., 62 F.Supp. 161 (E.D. Pa. 1945); Chatfield v. New Haven, 110 F. 788 (D. Conn. 1901).

[18] See, e.g., H. Christiansen & Sons, Inc. v. City of Duluth, 154 F.2d 205 (8th Cir. 1946) and Chambers-Liberty Counties Nav. Dist. v. Parker Bros & Co., 263 F.Supp. 602 (S.D. Tex. 1967).

ing to sue for such injury. Morevore, in *Alameda* the involvement of various sections of the Rivers and Harbors Act was on account of the filling or obstruction of large portions of San Francisco Bay. Such activity is clearly within the federally protected sphere of navigation and anchorage.

It is the court's opinion that the foregoing conclusion with respect to purposes and intent of the Rivers and Harbors Appropriation Act of 1899 is sound and fully supported by the legislative and administrative history of the Act. Section 407, like the other sections of the Rivers and Harbors Act, was enacted for the purpose of protecting navigation and anchorage and not as a general pollution control statute or to create a private right unrelated to navigation or anchorage. The Rivers and Harbors Appropriation Act of 1899 was adopted following a report to Congress by the Secretary of War which, at the prior direction of Congress, contained a compilation of existing laws relating to navigable water.[19] Section 13 (33 U.S.C.A. § 407) was derived from two pre-existing statues: an 1890 Act which made it unlawful to empty into navigable waters ". . . any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind . . . *which shall tend to impede or obstruct navigation* . . ."[20] (26 Stat. 453) and an 1894 Act which prohibited deposits in harbors and rivers for which Congress had appropriated money for improvements, of ". . . ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state."[21] See *United States v. Standard Oil Co.*, 384 U.S. at 227-8 (1966).

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[19] See United States v. Republic Steel Corp., 362 U.S. 482, 486 (1960).

[20] 26 Stat. 453.

[21] 28 Stat. 363; 33 U.S.C.A. § 407 at p. 101 (1970).

Although the Act of 1894 did not contain a concluding phrase like that in the Act or 1890, the legislative history of the 1894 Act makes it clear that its purpose was to prohibit the discharge of materials which were reducing channel depths and making necessary expensive dredging. See 26 Cong. Record 4376—(House, May 3, 1894). Moreover, the 1894 Act was construed by the Attorney General of the United States in 1896 as being subject to the same limitation. A group of mine operators applied to the Secretary of War for designation of an area where they could dump ore washings without violating the 1894 Act. The Secretary determined that discharge of the ore washings would *not* affect navigability of the river. However, because of opposition by parties contending that the discharge ". . . destroys the fish, pollutes the water so as to destroy its usefulness for domestic purposes, and injuries scenery along the stream . . . ," the Secretary asked the Attorney General whether he was required to act on the application and whether he should consider matters other than the affects on navigation. The Attorney General replied:

> I am of the opinion that it is your duty to act upon the application. If you should decline to act in this and similar cases the above section would operate as an absolute prohibition. This was not the intention of Congress. * * * You should, therefore, be governed only by considerations affecting the navigation of the rivers.
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> 21 Op. Atty. Gen 305, 307-8 (1896)

With this Attorney General's opinion forming a part of the background, the House Conferees said of the compilation which became the Act of 1899 that it contained ". . . no essential changes in existing laws." 32 Cong. Record 2923 (House). The fact that the Act of 1899 made no substantive change in the pre-existing statutes has been recognized by the Supreme Court. *United States v. Republic*

Steel Corp., 362 U.S. at p. 486 n. 4; *United States v. Standard Oil Co.*, 384 U.S. at p. 228. Certainly a provision intended to create a federal cause of action in favor of riparian landowners for impairment of the value and enjoyment of their riparian lands unrelated to impairment of rights of navigation would have been a major substantive addition to the pre-existing statutes.

The Congressional debates on the Rivers and Harbors Appropriation Act are consistent with this construction and include assurances by one of its supporters that it would ". . . simply revise and make clearer and more definite laws that have already been enacted . . ." and that it was ". . . better adapted to serve the interests of *commerce and navigation* than the laws in their present form." 32 Cong. Record 2297 (Senate, Feb. 24, 1899). No reported case of which this Court is aware, during the more than three-quarters of a century since its original enactment, has held that Section 407 created any private right unrelated to the special federal interest in protecting navigation.

The statute by its very wording makes any other construction most improbable. It prohibits all discharge of refuse regardless of quantity or quality, but then authorizes the appropriate federal official to permit the discharge of all such refuse regardless of quantity or quality "whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby." Any right or injury, unrelated to interference with rights of navigation, is outside the special federal interest and protection covered by the Rivers and Harbors Act.

Not only is this important in determining the legislative intent, but it also points up that Section 407, if related at all to plaintiff's action, is merely tangential. The damages plaintiffs claim to have suffered result from the material alleged to have been discharged into the streams and not from any failure to have permits for their discharge. Plaintiffs' injuries would be no less, if the same discharge were

made with federal permits after determination that such discharges would not injure anchorage or navigation. The fact that the same material is discharged without a permit adds nothing to plaintiffs' injury or right of action.

The long-standing administrative construction of 33 U.S.C.A. § 407, while not conclusive as to the proper construction, is entitled to "great weight" in construing the Act.[22] As recently as 1968, the Code of Federal Regulations included the following provisions as part of the Corps of Engineers' regulations on depositing refuse in navigable waters:

> Section 13 of the River and Harbor Act of March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407), prohibits the deposit in navigable waters generally of 'refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state.' *The jurisdiction of the Department of the Army, derived from the Federal laws enacted for the protection and preservation of the navigable waters of the United States, is limited and directed to such control as may be necessary to protect the public right of navigation.* Action under section 13 has therefore been directed by the Department principally against the discharge of those materials that are obstructive or injurious to navigation.
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> 33 C.F.R. § 209.395 (1968)

All of this leads the Court to conclude that although Section 407 may create a federally protected right against deposit of refuse which injures navigation or anchorage, the injury of other private rights, even from deposits in violation of Section 407, does not give rise to a federal right of action nor does it supply a basis of federal jurisdiction in this case.

This conclusion highlights the analogy between 33 U.S.C.A. § 407 and the Safety Appliance Acts.[23] Violation

[22] United States v. Republic Steel Corp., 362 U.S. 482, 491 (1960).
[23] 45 U.S.C.A. § 1, et seq.

of those acts resulting in injury to railroad employees, the special class sought to be protected, is the basis of a federally created cause of action under the Federal Employers' Liability Act.[24] However, there is no such federal cause of action in favor of persons other than railroad employees who may be injured as the result of conduct which violates these same federal statues. For example, in cases growing out of railroad crossing collisions, and other accidents not involving railroad employees, one of the recognized grounds of negligence in a state common law cause of action is defendant's violation of the Federal Safety Appliance Acts. Such violations have been advanced as a basis for federal court jurisdiction on the theory that, because such a violation is alleged to have proximately caused the injury sued for, the action arises under a federal statute. However, it is uniformly held that there is no federal jurisdiction of such actions under 28 U.S.C.A. § 1331.[25]

This court is not unmindful of the increasing interest and concern at all levels of government with environmental and ecological problems. All agencies of the federal government are now required under legislation such as the National Environmental Policy Act of 1969[26] and the Fish and Wildlife Coordination Act[27] to take into consideration the ecological and environmental impact of any of its actions. Recent establishment of a federal permit program under 33 U.S.C.A. § 407 based on general environmental criteria apparently has its foundation in the policies and requirements of such recent legislation. This is made clear by the reasoning and holding of the Court in *Zabel v. Tabb*,

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[24] 45 U.S.C.A. § 51, et seq.

[25] Crane v. Cedar Rapids & I.C.R. Co., 395 U.S. 164 (1969); Jacobson v. N.Y.N.H. & H.R. Co., 206 F.2d 153 (1st Cir. 1953) aff'd 347 U.S. 909 (1959); Andersen v. Bingham & G. Ry. Co., 169 F.2d 328 (10th Cir. 1948); Owens v. N.Y.C.R. Co., 267 F.Supp. 252 (E.D. Ill. 1967); Boncek v. Penn R. Co., 105 F.Supp. 700 (D. N.J. 1952).

[26] 42 U.S.C.A. §§ 4331-4347.

[27] 16 U.S.C.A. §§ 661, 662.

430 F.2d 199 (5th Cir. 1970). However, there is nothing in such legislation to suggest that Section 407 was intended to create a private right of action for the kind of injuries these plaintiffs claim to have sustained. In addition, the court is informed that both Houses of Congress now have before them a number of versions of a bill introduced by Senators Hart and McGovern (S.1032) allowing any person to bring suit in the federal courts against either federal agencies or private defendants to challenge conduct alleged unreasonably to result in environmental pollution. Though this circumstance may be only faintly persuasive, it does indicate that the sponsors of these bills believe that the right to maintain such suits in federal court is not provided by existing legislation. This court is firmly of the opinion that if plaintiffs are to be allowed to bring private damage suits for injuries traditionally local in nature and already covered by local statutory and common law, additional federal legislation is imperative. Such authority cannot be found in the existing law.

Convinced for the reasons above set forth that this court lacks jurisdiction of this action, it is unnecessary and would be inappropriate to consider the other issues raised by defendants' motions to dismiss. An order will be entered dismissing the action for lack of federal jurisdiction.

This, the 21st day of June, 1971.

SEYBOURN H. LYNNE

Chief Judge

APPENDIX IV

Judgment of District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

T. W. GUTHRIE, et al., Plaintiffs	)	
vs.	)	CIVIL ACTION
ALABAMA BY-PRODUCTS COMPANY, a Corporation, et al., Defendants	)	NO. 71-21

JUDGMENT

In conformity with the opinion of the Court contemporaneously filed herewith,

It is ORDERED, ADJUDGED and DECREED by the Court that this action be and the same is hereby dismissed for lack of jurisdiction.

DONE this 21st day of June, 1971.

SEYBOURN H. LYNNE
Chief Judge

APPENDIX V

BNA ENVIRONMENT REPORTER
Monograph No. 11

THE BUREAU OF NATIONAL AFFAIRS, INC.
January 28, 1972 Volume 2, No. 39

THE REFUSE ACT OF 1899

By Ray M. Druley

INTRODUCTION

Section 13 of the Rivers and Harbors Act of 1899, known as the Refuse Act,[1] has become an important part of the federal water pollution abatement program.

Russell Train, chairman of the President's Council on Environmental Quality (CEQ) called the initiation of the Refuse Act permit program the "single most important step" the U.S. has taken to abate water pollution.[2] The irony of the Refuse Act's importance in present water pollution programs prompted Timothy Atkeson, general counsel of CEQ, to refer to the act as, "that sparkling innovation in antipollution legislation of the McKinley Administration."[3]

The utilization of the Refuse Act for water pollution control is to a great extent the result of weaknesses of the

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[1] Act of March 3, 1899, Sec. 13, 30 Stat. 1152, as amended, 33 U.S.C. Sec. 407 (1964); Environment Reporter — Federal Laws 75:5501. [References to Federal Laws and Environment Reporter — Federal Regulations are subject to change.]

[2] In a press conference December 23, 1970; 1 Environment Reporter — Current Developments 910.

[3] Speech to ALI-ABA Seminar on Environmental Law, Smithsonian Institution, Washington, D.C., January 28, 1971, *Hearings on Refuse Act Permit Program before the Subcomm. on the Environment of the Senate Comm. on Commerce*, 92nd Cong., 1st Sess., ser. 92-7, at 153 (1971). [Hereinafter cited as *Refuse Act Hearings*].

Federal Water Pollution Control Act (FWPCA).[4] President Nixon called the enforcement machinery of the FWPCA "cumbersome,"[5] and the General Accounting Office,[6] Environmental Protection Agency,[7] environmental organizations,[8] and writers have agreed.[9]

The principal weaknesses in the enforcement machinery of the FWPCA are: (1) the Government must give a violator of water quality standards 180 days notice prior to bringing court action, (2) the FWPCA applies only to interstate waters which comprise only about 14 percent of all waters in the United States, (3) the FWPCA provides for the establishment of "stream standards" for a body of water, and not "effluent standards," standards prescribed for the source of the discharge. Pending legislation would strengthen FWPCA. Only one court action for violation of water quality standards has been brought under the FWPCA.[10]

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[4] 33 U.S.C. Sec. 1151, et seq.; Environment Reporter — Federal Laws 71:5101.

[5] President Nixon's Message to Congress, February 10, 1970, Environment Reporter — Federal Laws 21:0201.

[6] General Accounting Office, *Controlling Industrial Water Pollution — Progress and Problems* (1970).

[7] *Hearings on Water Pollution Control Legislation — 1971 (Oversight of Existing Programs) Before the House. Comm. on Public Works* 92nd Cong., 1st Sess., pt. 1, at 557-575 [hereinafter cited as *Water Pollution Oversight Hearings*].

[8] *Hearings on Bills Amending the Federal Water Pollution Control Act and Other Pending Legislation Relating to Water Pollution Control, Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works,* 92nd Cong., 1st Sess., ser. 92-H9, pt. 2, at 607-697.

[9] Note, *The Refuse Act: Its Role Within the Scheme of Federal Water Quality Legislation,* 46 N.Y.U.L. Rev. 304, 319-323 (1971); Barry, *The Evolution of Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulties in Developing Effective Legislation,* 68 Mich. L. Rev. 1103 (1970); Note, *Water Quality Standards in Private Nuisance Actions,* 79 Yale L.J. 102 (1969); Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality,* 52 Iowa L. Rev. 186 (1966).

[10] Stein, *The Actual Operation of the Federal Water Pollution Control Administration,* 3 Natural Res. Law 41, 46 (1970).

The mercury crisis emphasized the usefulness of the Refuse Act and weaknesses of the FWPCA. In the summer of 1970 reports of mercury contamination of fish from Japan and Sweden were followed by reports of mercury contamination of fish in the U.S., resulting in the outlawing of fishing in many lakes and rivers.[11] Upon recommendation of the Department of Interior, civil actions for injunctive relief under the Refuse Act were filed against 10 companies to halt discharge of mercury.[12] Nine of the 10 companies agreed to stipulated judgments, which in general limited mercury discharges to one-half pound per day.[13] The other company went out of business.[14]

Figures released by the EPA general counsel reflected the success of the actions.[15] The mercury discharges of the companies were reduced from 139 pounds per day to two pounds per day. In addition, 50 industrial mercury dischargers reduced their mercury discharges by 86 percent as of September 17, 1970, and by 97 percent according to a later EPA analysis.

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[11] A State-by-state Pollution Survey, *Hearings on Mercury Pollution and Enforcement of the Refuse Act of 1899 Before the Subcomm. on Conservation and Natural Resources of the House on Government Operations,* 92nd Cong., 1st Sess., pt. 1, at 424-442 (1971) [hereinafter cited as *Mercury Enforcement Hearings*]; *See also Hearings on the Effects of Mercury on Man and The Environment Before the Subcomm. on Energy, Natural Resources and the Environment of the Senate Comm. on Commerce,* 91st Cong., 2nd Sess., ser. 91-73, pts. 1-3 (1970).

[12] Department of Interior press release, July 24, 1970; Justice Department press release, July 24, 1970.

[13] Justice Department press release, October 29, 1970; Georgia-Pacific Corporation, Bellingham, Wash.; Olin Mathieson Chemical Corporation, Niagara Falls, NY.; Weyerhaeuser Company, Longview, Wash.; Olin Mathieson Chemical Corporation, Augusta, Ga.; Diamond Shamrock Corporation, Delaware City, Del.; Diamond Shamrock Corporation, Muscle Shoals, Ala.; Allied Chemical Company, Solvay, N.Y.; International Mining and Chemical Company, Chlor-Alkali Division, Orrington, Me.; and Pennwalt Chemical Company, Calvert City, Ky.

[14] Justice Department press release, October 29, 1970; Oxford Paper Company, Rumford, Maine.

[15] *Mercury Enforcement Hearings, supra* note 11, at 46-71.

The effectiveness of the Refuse Act in relieving the mercury crisis was because of the Act's broad prohibitions and simple, effective enforcement machinery. The Act forbids: (1) the discharge into navigable waters or their tributaries "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state" and (2) the depositing of "material of any kind in any place on the bank of any navigable water or tributary where the same shall be liable to be washed into such navigable water. . .,whereby navigation shall be impeded or obstructed."

A proviso to the Act authorizes "the Secretary of War, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured. . .,to permit the deposit of any material. . .in navigable waters, within limits to be defined and under conditions to be prescribed by him."

Section 16 of the Rivers and Harbors Act of 1899[16] provides that violation of the Refuse Act constitutes a misdemeanor punishable by a fine of no less than $500 and no more than $2,500 or by imprisonment of not less than 30 days nor more than one year. In addition, section 16 provides that "one-half of said fine [is] to be paid to the person or persons giving information which shall lead to conviction."

Section 17 places the responsibility for enforcement of the Act with the Justice Department.[17]

LEGISLATIVE HISTORY

The threshold issue in any consideration of the Refuse Act is, what constitutes "any refuse matter of any kind or description whatever"? The question is, does the Act prohibit the discharge of matter which pollutes the water but

[16] 43 U.S.C. Sec. 410.
[17] 43 U.S.C. Sec. 411.

does not obstruct navigation? The U.S. attorney for the Western District of Pennsylvania has termed this the "pollution vs. navigation argument."[18]

A starting point, but only a starting point, on this issue is the legislative history of the Act. The Act is a codification of two prior statutes — Section Six of the 1890[19] and 1894[20] Rivers and Harbors Acts, which were based on the 1886[21] and 1888[22] New York Harbors Act. (The text of the four acts as follows as appendix A.)

The 1890 Act was the first general legislation for protection of navigable waters.[23] The Act was prompted by the U.S. Supreme Court's opinion holding that the Government had no common law authority to protect navigable waters from obstructions.[24]

Judge G. W. Koonce, who was with the Army Corps of Engineers from 1886 through 1926, described the background of the 1890 Act as follows:

> While a broad and systematic policy of river and harbor improvement was early adopted and pursued uninterruptedly. . .,it seems not to have occurred to the legislative mind that protection of waterways from trespass and obstruction was as vital and important as improvement. It was well understood of course that the power of Congress to regulate and improve navigable waters included the power to keep them open and free from obstructions to their navigation, to remove such obstructions as exist and provide against their recurrence; and that it was for Congress to determine when its full power would be brought into activity. Nevertheless, it

[18] Brief in Opposition to Motion to Dismiss, United States v. U.S. Steel Corp., No. Crim. 71-74, at 8, filed July 22, 1971 (W.D. Pa.).

[19] 26 Stat. 453.

[20] 28 Stat. 363.

[21] 24 Stat. 329.

[22] 25 Stat. 209.

[23] United States v. Standard Oil Co., 384 U.S. 224, 1 ERC 1033, 1035 (1966) (dissenting opinion).

[24] Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888).

is a historic fact that for nearly a century this power which clearly existed in Congress lay dormant and unexercised. In the meantime, while the Government was expending hundreds of millions of dollars to increase the facilities of navigation, interested parties, including states, corporations, and individuals, were placing obstructions and impediments of all kinds in and across the improved waterways. The necessity for federal legislation to protect these waterways from impairment and ultimate destruction eventually became urgent. Prior to 1890, efforts along this line were sporadic, fragmentary, and directed chiefly to the suppression of some obnoxious local practice.[25]

Debate on the substantive provisions of Section 6 of the 1890 Act was overshadowed by the extensive debate on Section 7, now Section 10, concerning dredge and fill activities in navigable waters.[26]

In support of a favorable recommendation of HR 394, which became section Six of the 1890 Act, the House Committee on Rivers and Harbors[27] referred to an 1889 report of the Army Corps of Engineers that called attention "to the necessity for legislation to prevent the obstruction of navigable waters and to protect public works against trespass or injury." The committee report also incorporated a letter dated January 13, 1877, which mentioned "instances of serious injury to navigable waters by the discharge of sawmill waste into streams" and to "channels . . . from deposits of ballast, steam-boat ashes, oysters, and rubbish from passing vessels." The letter also said, "The special act of Congress (see vol. 18, Statutes at Large, part 3, p. 50) for the protection of the work in progress for the im-

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[25] Lecture by Judge G. W. Koonce, Federal Laws Affecting River and Harbor Works, Company Officer Class, The Engineer School, Fort Humphreys, Va., April 23, 1926, *Water Pollution Oversight Hearings, supra* note 7, at 284-291.

[26] United States v. Republic Steel Corp., 362 U.S. 482, 1 ERC 1022 (1960).

[27] H. R. Rep. No. 477, 51st Cong., 1st Sess. (1890).

provement of the mouths of the Mississippi by dredging has proved defective, inasmuch as it requires proof of malice or intention, instead of injury or impediment to navigation."

The Senate bill (S 88) was amended by the Senate to conform with HR 394 by adding to the list of prohibited substances "slag, cinders, ashes, refuse, and waste," and by changing the clause "which shall impede or obstruct navigation" to "which shall tend to impede or obstruct navigation."[28] Both bills were passed as Section 6 of the Rivers and Harbors Act of 1890 with no significant debate over their provisions. However, it is clear only from the wording of the Act but also from the meager legislative history that the 1890 Act intended to prohibit only discharges "which tend to impede or obstruct navigation."

The legislative history of Section Six of the 1894 Act is equally limited. A draft of Section Six of the 1894 Act was submitted to Congress because of a complaint that rubbish was being dumped into Savannah Harbor, Ga., and that works of improvement were being injured by vessels navigating the waters.[29] It was claimed that the 1890 Act did not provide an effective remedy. General O. M. Carter of the Army Corps of Engineers, in submitting a draft of the bill that was based on the New York Harbor Act of 1888, said, "It is quite important that there should be some effective method of enforcing the prohibition relating to the depositing of refuse and the injuring of works of improvement in navigable waters of the United States."[30]

In justification for Section 6 of the 1894 Act being included in an appropriations bill, Congressman Grovenors, sponsor of the bill, said that the bill was designed to prevent the filling up of harbors with refuse requiring the

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[28] 21 Cong. Rec. 1319 (1890).
[29] H.R. Doc. No. 123, 54th Cong., 2d Sess. (1894).
[30] *Id.*

appropriation of additional money for dredging.[31] He said, "[C]ertainly [our jurisdiction covers] the question of the filling up of the navigable waters by deposits made in harbors or in rivers, . . .matters which relate strictly to the improvement and maintenance of navigation."

Congressman Catchings mentioned that the bill was a further provision for enforcing the 1888 New York Harbor Act "to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York City."[32] He noted that large amounts of "city refuse, cellar dirt, garbage, ashes, etc." were being dumped into New York Harbor – 9,000,000 cubic yards in 1893 — and said, "The provision in the pending bill is intended simply to regulate the disposition of that enormous mass of refuse material."

This was the extent of the debate in either house on the bill that was passed as Section Six of the 1894 Act. The 1894 Act did not include the concluding phrase, "which shall tend to impede or obstruct navigation." It did include a general clause after the enumerated items, prohibiting the discharge "of any other matter," which was not included in the 1894 Act.[33]

In 1896 the U.S. attorney general issued an opinion[34] interpreting the 1894 Act, in response to an inquiry from the secretary of War concerning a permit application from a group of mine operators who wanted to discharge ore washings without violating the 1894 Act. The secretary of War determined that navigation would not be affected by the discharge, but there was opposition to issuance of the permit by parties contending that the discharge "destroys the fish, pollutes the water so as to destroy its usefulness for domestic purposes, and injures scenery along the stream." The secretary asked the attorney general whether

[31] 26 Cong. Rec. 4358 (1894).
[32] *Id.* at 4376.
[33] *See* Appendix A.
[34] 21 Op. Atty. Gen. 305.

he was required to act on the application and whether he should consider matters other than effects on navigation. The attorney general replied that the secretary was required to act on the application; otherwise, the attorney general said, the Act "would operate as an absolute prohibition." According to the attorney general, "This was not the intention of Congress." He instructed the secretary, "You should, therefore, be governed only by considerations affecting the navigation of the rivers."

The conclusion to be drawn from the attorney general's opinion, the wording of the Act, and the limited debate on its provisions, is that Section Six of the 1894 Act prohibited discharges, without a permit, that did not impede navigation, but the purpose of the Act was limited to protecting "the navigation of rivers." The prohibitions of the Act were broader than its purpose, resulting in the corps having administrative authority over all discharges.

As noted above, the Refuse Act is a codification of the 1890 and 1894 Acts. The codification was made pursuant to a directive in the 1896 Rivers and Harbors Act, which directed the secretary of War to prepare "a compilation of all general laws . . . for the maintenance, protection, and preservation of the navigable waters of the United States, and to submit the same to Congress with such recommendation as to revision, emendation or enlargement of the said laws as in his judgment would be most advantageous to the public interest."[33]

A draft of the codification and compilation of prior laws was transmitted to Congress on February 13, 1897, by the Army Corps of Engineers.[34] The letter of transmittal incorporated a letter by John M. Wilson, chief of the corps, that said the codification, consisting of 13 sections, was "believed to be clear and free from ambiguity, and better

[33] 29 Stat. 234.
[34] H.R. Doc. No. 293, 54th Cong. 2nd Sess. (1899).

adapted to conserve the important interests of commerce and navigation."

No action was taken upon the draft codification for over two years and then it was passed by the House of Representatives as a measure independent of the Rivers and Harbors Act. Lieutenant Colonel A. MacKenzie of the Army Corps of Engineers then transmitted a copy of the bill, passed by the House, to the Senate on February 17, 1899, with the statement that "these sections contain no new matter but simply revise and make clearer and more definite laws that have been already enacted."[37] Senator Fry, chairman of the Senate Commerce Committee and sponsor of the bill, reiterated the assurances of Colonel MacKenzie and said, "There are not ten words changed in the entire thirteen sections."[38]

Senator Fry's assurances foreclosed any significant debate on the substance of the bill.[39] The bill was passed by the Senate exactly as submitted by the corps and became sections nine to 21 of the Rivers and Harbors Act of 1899.

The House Conference Report on the Act said, "The bill as now agreed upon and presented also includes a codification of existing laws pertaining to rivers and harbors, though containing no essential changes in the existing laws."[40]

Section 13 of the 1899 Act was a composite of both the 1890 and 1894 Acts.[41] It substituted the term "any refuse matter of any kind or description whatever," for the enumerated lists in the prior bills. It adopted the streets and sewers exception in the 1894 Act. It omitted the 1890 limitation — "which shall tend to impede navigation" — from the first clause but included it in the second clause, which

[37] *Id.*
[38] 32 Cong. Rec. 2296 (1899).
[39] *Id.*
[40] 32 Cong. Rec. 2923.
[41] *See* Appendix A.

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is separated from the first with a semicolon. The reason for these inclusions and omissions is not known.

It is clear that the main purpose of the Refuse Act of 1899 was to protect the navigability of rivers and harbors. As the U.S. Supreme Court stated in *United States v. Wyandotte Transportation Co.*:[43] "The Rivers and Harbors Act of 1899, an assertion of the sovereign power of the United States, . . . was obviously intended to prevent obstruction in the Nation's waterways." There were state statutes in effect in 1899 to prevent water pollution,[44] and the concern over water pollution in 1899 is undeniable, but the fact remains that there was no discussion of the problem in relation to the Refuse Act.[45]

This does not mean that the Act does not and did not intend to prohibit all discharges of refuse, without a permit, regardless of whether they obstructed navigation. In fact, the legislative history does show that the drafters and sponsor of the Act wanted to make it as broad as possible to insure that it would be effective in protecting the navigability of waters. This is evidenced by the dissatisfaction with the 1890 Act which prohibited by the discharge of substances that tended to impede navigation. The broadness of the entire Rivers and Harbors Act of 1899 is emphasized by Mr Koonce, who was one of the drafters of the Act, as follows:

> It was intended to be, and is, an assertion of police power to protect from physical injury those highways of commerce in which the Federal Government has dominion and propriety, and within its comprehensive provisions are embraced all forms and varieties of physical obstructions. An examination and study of the law will impress anyone with the organic and far reaching character of

[43] 389 U.S. 191 (1967).

[44] Rodgers, *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. Pa. L. Rev. 761, 771-772 (1971).

[45] Eames, *The Refuse Act of 1899: Its Scope and Role in Control of Water Pollution*, 1 Ecology L. Q. 173, 181, n. 54 (1971).

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the jurisdiction asserted and with its evident value both as a preventive and remedial measure.[45]

Mr. Koonce then said that, "Under . . . section 13, relating to the discharge of [sic] deposit of refuse matter in navigable water the commission of any of the acts forbidden, not their results, constitute the offense, and the commission subjects the offending party to the prescribed penalty, *regardless of whether or not there is any actual injury to navigation.*" (Emphasis added.) He then added that discharges that did "no material public injury" were not normally prosecuted and that the corps considered only effects upon navigation in determining whether to issue or deny a permit.

[45] *Supra* note 25.